

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT WHITEHEAD,

Plaintiff-Appellant,

v

COUNTY OF MACOMB and MACOMB
COUNTY BOARD OF COMMISSIONERS,

Defendants-Appellees.

UNPUBLISHED

May 18, 2010

No. 289203

Macomb Circuit Court

LC No. 2008-001735-AW

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

In this mandamus action, plaintiff appeals as of right the trial court's opinion and order granting summary disposition in defendants' favor. We affirm.

I. BASIC FACTS

Plaintiff is the assistant director of the Macomb County Youth Home (MCYH). In August 2001, a disciplinary incident occurred between a resident, Eric Seales, and a MCYH staff member Fred True. Plaintiff investigated the matter and True's employment was terminated. In December 2004, Seales filed a lawsuit in federal district court against Macomb County, True, plaintiff, and other MCYH staff members.¹

In early January 2004, the county verbally informed the defendants in the *Seales* case that it would be providing them with legal representation through the law firm of Plunkett Cooney, P.C. Plaintiff, however, informed George Brumbaugh, defendants' corporate legal counsel, in a January 12, 2004 letter that he would be hiring separate counsel to represent him in the suit based on a belief that a conflict existed between himself and True. According to plaintiff,

¹ Seales alleged that his civil rights had been violated as a result of the incident in violation of 42 USC 1983. Apparently, Seales claimed that True had punched him twice in the face in True's attempts to subdue him. See *Seales v Macomb Co*, unpublished opinion of the Eastern District of Michigan, issued September 29, 2006 (Docket No. 03-40336).

representation of all the defendants by a single attorney would expose him to an adverse position because, as a trainer of MCYH staff, the other defendants could re-direct responsibility to him for physical actions taken against MCYH residents. Plaintiff's letter requested that the county be responsible for the separate legal fees that he would accrue in connection with the litigation.

All defendants were formally made aware that Plunkett Clooney would be representing them in a January 14, 2004 letter. On January 15, 2004, Brumbaugh responded to plaintiff's request for separate counsel in writing and informed plaintiff that the county would not be responsible for plaintiff's legal fees if he chose to proceed with a separate counsel. The letter unequivocally stated,

[S]hould you choose to use someone other than Mr. Brochert of Plunkett and Cooney as your attorney the County will not assume the payment of any expenses that you incur in defending this action. Thus, should you decide to proceed as you indicated in your correspondence of January 12th, you do so at your own expense.

Further, according to Brumbaugh's letter no conflict of interest existed between plaintiff and the employees, former employees, and the county that would warrant the appointment of separate counsel for plaintiff. Plaintiff decided to proceed with his own attorney. The *Seales* case was dismissed as to plaintiff and all the other defendants, including True, in September 2006. *Seales v Macomb Co*, unpublished opinion of the Eastern District of Michigan, issued September 29, 2006 (Docket No. 03-40336).

On April 18, 2008, plaintiff filed a one-count complaint requesting a writ of mandamus requiring defendants, Macomb County and the Macomb County Board of Commissioners, to reimburse plaintiff for the attorney fees he accrued in connection with the *Seales* lawsuit. After the close of discovery, the parties filed cross-motions for summary disposition. The trial court ruled in defendants' favor. In its opinion and order, the trial court found that defendant is not statutorily obligated to provide plaintiff with legal counsel. It also found that neither the Macomb County Personnel Manual (personnel manual) nor the local union agreement, both of which plaintiff alleged created a contractual duty to provide counsel, gave rise to a clear legal duty that would sustain a mandamus action. The court reasoned that, in the absence of some clear legal duty to provide counsel, plaintiff's claim for mandamus necessary fails. Plaintiff now appeals.

II. STANDARDS OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 712; 777 NW2d 205 (2009). Although defendants moved for summary disposition only under MCR 2.116(C)(7) and (8), the trial court considered facts outside the pleadings and thus appears to have granted defendants summary disposition on the basis of MCR 2.116(C)(10). Summary disposition under this subrule is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fries*, 285 Mich App at 712-713. In reviewing a trial court's decision, we must consider all the admissible evidence, including admissions, affidavits, depositions, and other submitted documentary evidence, in a light most favorable to the party

opposing the motion. *Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008).

Further, we review for an abuse of discretion a trial court's decision to grant or deny a writ a mandamus. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006). And, "[w]hether defendants had a clear legal duty to perform and whether plaintiff[] had a clear legal right to the performance of that duty, the first two steps in the test for assessing the propriety of a writ of mandamus, are questions of law that we . . . review de novo." *Tuggle v Michigan Dep't of State Police*, 269 Mich App 657, 667; 712 NW2d 750 (2006).

III. ANALYSIS

Plaintiff argues that the trial court erroneously concluded that a writ of mandamus did not lie under the circumstances. We disagree with plaintiff. "[A] writ of mandamus is an extraordinary remedy and will only be issued where: (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008). The party seeking a writ of mandamus bears the burden of demonstrating that he is entitled to it. *Carter*, 271 Mich App at 439.

In the present matter, plaintiff has failed to demonstrate that he is entitled to a writ of mandamus. Specifically, he has not shown that he has a clear legal right to legal representation or reimbursement for attorney fees or that defendants have the concomitant clear legal duty to provide counsel. To the contrary, the governmental immunity act merely *permits* governmental agencies to provide their employees with an attorney in the event that a civil action is commenced against an employee. Specifically, MCL 691.1408(1) provides:

Whenever a claim is made or a civil action is commenced against an officer, employee, or volunteer of a governmental agency for injuries to persons or property caused by negligence of the officer, employee, or volunteer while in the course of employment with or actions on behalf of the governmental agency and while acting within the scope of his or her authority, the governmental agency *may* pay for, engage, or furnish the services of an attorney to advise the officer, employee, or volunteer as to the claim and to appear for and represent the officer, employee, or volunteer in the action. The governmental agency *may* compromise, settle, and pay the claim before or after the commencement of a civil action. Whenever a judgment for damages is awarded against an officer, employee, or volunteer of a governmental agency as a result of a civil action for personal injuries or property damage caused by the officer, employee, or volunteer while in the course of employment and while acting within the scope of his or her authority, the governmental agency *may* indemnify the officer, employee, or volunteer or pay, settle, or compromise the judgment. [Emphasis added.]

As our Supreme Court has acknowledged, "[t]he use of the word 'may' in [MCL 691.1408(1)] makes clear that the decision to pay an officer's attorney fees is a matter left to the discretion of the municipality." *Warda v City Council*, 472 Mich 326, 332; 696 NW2d 791 (2005). Thus, it cannot be said that, by law, plaintiff has a clear legal right to counsel. Nor can we conclude that

the act imposes upon defendants a clear legal duty to provide plaintiff with counsel. Rather, a government agency's decision to provide counsel to its employees is entirely discretionary under the act. "Mandamus will not lie to control the exercise of discretion . . . of administrative bodies" *PT Today, Inc v Comm'r of the Office of Fin and Ins Servs*, 270 Mich App 110, 133; 715 NW2d 398 (2006). Thus, defendants also have no clear legal duty to do the act requested.

Plaintiff, however, contends that both the county's personnel manual and the local union agreement conferred upon him a legal right to counsel. At the outset, we note that even if this were true, plaintiff's claim would nonetheless fail because, as we have already concluded, MCL 691.1408(1) does not create a legal duty on behalf of defendants to provide its employees with legal counsel. Assuming *arguendo* that this were not the case, plaintiff, however, has not otherwise established a clear legal right to counsel under the circumstances. Nothing in the language of either the personnel manual or the union agreement gives plaintiff a right to counsel or creates for defendants a legal duty to provide counsel. The personnel manual provides:

Liability Insurance: The County shall provide Bodily Injury and Property Damage Liability Insurance to each regular employee while said employee is acting within the scope of his/her duties; and, Personal Injury Insurance when also arising out of and in the line of duty and in the conduct of duly constituted County business. The cost of this insurance will be borne by the County.

Similarly, the union agreement provides:

Liability Insurance: The County shall provide for each regular full-time employee Bodily Injury and Property Damage Liability Insurance while acting within the scope of his/her duties and Personal Injury Insurance including "false arrest" when also arising out of and in the line of duty and in the conduct of duly constituted Employer business. The cost of this insurance will be borne by the Employer.

Plainly, these provisions only indicate that the county will provide liability insurance to its employees. They say absolutely nothing in regard to the provision of counsel or legal fees. Because plaintiff has failed to establish a clear legal right to counsel provided by defendants or otherwise establish the other elements that would justify the propriety of a writ of mandamus, he has failed to meet his burden. Accordingly, the trial court did not err by dismissing plaintiff's complaint and granting summary disposition for defendants.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens